

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MCM GROUP 22 LLC,

Plaintiff,

Case No.: 22-cv-06157-JHR

-against-

LYNDON PERRY,

Defendant.

**NOTICE OF SUPPLEMENTAL AUTHORITY IN
SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

Defendant Lyndon Perry respectfully provides the Court with notice of supplemental authority, *Michael Kelley v. Morning Bee, Inc., et al.*, Case No. 1:21-cv-08420-GHW (S.D.N.Y Sept. 26, 2023) attached as Exhibit A. The decision in *Kelley* bears on Defendant's fair use defense as set forth in Defendant's Motion to Dismiss (Doc. No. 28).

In *Kelley*, plaintiff was a professional photographer, whose copyrighted photographs were featured in a solo art exhibit in New Zealand's Auckland Airport in 2018. *Id.* at *2. In 2021, Defendants produced a film which included a scene depicting an arrival at Auckland Airport, where plaintiff's photographs were on display at the time. *Id.* The full scene in question occurs for approximately forty-three seconds. *Id.* at *3-4. During approximately fifteen seconds of that scene, plaintiff's photographs appear in the background. *Id.*

The court evaluated the fair use factors in light of the recent decision in *Andy Warhol Found. For the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258 (2023) and held the defendant's transformative use of plaintiff's photographs was fair use. *Id.* at *25-35. Under the first factor, the purpose and character of the work, the court ruled this factor favored the defendant because

the plaintiff's photographs and the defendant's film "serve unquestionably different purposes." *Id.* at *28. The third factor weighed heavily in favor of defendant because the photographs were of minimal use and reasonable in relation to the purpose of the copying. *Id.* at *31-32. Lastly, the fourth factor favored defendant because the use of the photographs in the background of a scene did not harm plaintiff's ability to license the photographs for publication and use. *Id.* at *32-34.

The evaluation of the fair use factors in *Kelley*, applying *Warhol*, support Defendant's fair use defense here. As argued, Defendant's use of a still frame from a long-form video was a *de minimis* use. Moreover, Defendant used the image for a different purpose than the original video. Defendant used that image to criticize Celsius's business practices, including hiring Ms. Khater. The use of the photograph would not harm plaintiff's ability to license its work for publication and use. The image, a single still frame from a video, was transformative such that demand for this new work can exist alongside the original. Thus, as in *Kelley*, Defendant's use is fair use.

Dated: October 3, 2023.

Respectfully Submitted,

/s/ Marc J. Randazza
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Lyndon Perry*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 3, 2023, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I further certify that a true and correct copy of the foregoing document being served via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Marc J. Randazza

Marc J. Randazza